

**Before the Federal Communications Commission  
Washington, D.C. 20554**

**In Re:  
Rules and Regulations  
Implementing the Telephone  
Consumer Protection Act of  
1991**

**CG Docket No. 02-278**

**CG Docket No. 05-338**

**Petition for Rulemaking and  
Declaratory Ruling of Craig  
Moskowitz and Craig  
Cunningham**

**March 27, 2017**

**Reply Comments of the Software  
& Information Industry Association**

## Introduction

SIIA is the principal trade association of the software and information industries and represents over 800 companies that develop and market software and digital content for business, education, consumers, the Internet, and entertainment. SIIA's members range from start-up firms to some of the largest and most recognizable corporations in the world. SIIA member companies are market leaders in many areas, including but by no means limited to:

- software publishing, graphics, and photo editing tools;
- specialized and business to business publishing;
- financial trading and investing services, news, and commodities exchanges;
- internet search tools and cloud computing services;
- education software and online education services.

As this filing explains in more detail, SIIA's Connectiv division consists of business-to-business publishers that are in the midst of transitions from print to digital, and from web to mobile. As many other industries are, they are adjusting to a reality in which the smart phone becomes a significant and important means by which their customers conduct business. They routinely rely on the interpretation of "prior express consent" that the Commission has adopted in multiple prior Orders, as that interpretation is consistent with a statute that reflects a Congressional accommodation of legitimate competing needs.

The TCPA contains two provisions at issue in the petition. The first is the prohibition itself, which prohibits persons from "mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called

party) using any automatic telephone dialing system or an artificial or prerecorded voice.”<sup>1</sup> The second provision permits “an action for monetary loss from such a violation, or to receive \$500 in damages for such violation, whichever is greater.”<sup>2</sup> Willful violations result in treble damages.

As the Commission is no doubt aware, the statutory damage provision has created a swath of class action suits alleging nothing more than a bare violation of the statute.<sup>3</sup> An errant telephone or text messaging campaign can result in enormous and company-killing liability.

We are commenting on this petition for two reasons. First, we disagree with those initial commenters, as well as the petitioners themselves, who believe that the FCC has exceeded its authority under the TCPA. An examination of the plain language of the statute, the zone of interests protected by the TCPA, and the harms it is intended to ameliorate reveals that the existing agency interpretation of “express prior consent” falls well within its discretion. The statute gives the FCC authority to limit causes of action to circumstances in which it reasonably believes the statutorily required harm occurs. Neither the plain English definition of “express” nor the legislative history require a writing for consent to exist.

Second, adoption of the petition’s suggestion would have highly disruptive effects on SIIA’s members. The FCC’s current interpretation is both authorized by the text of the TCPA and a reasonable implementation of that authority.

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<sup>1</sup> 47 U.S.C. 227(b)(3)(A).

<sup>2</sup> *Id.* at (b)(3)(B).

<sup>3</sup> Although SIIA views the questions about whether such suits state a cause of action subject to Federal jurisdiction as open, we do not address those points here.

**The Existing Rules Reflect a Sensible Balance of Legitimate Interests, which is What Congress Intended the Commission to Do**

The rules promulgated by the agency determine under what circumstances a private right of action subsists. In interpreting its authority under *Chevron*, therefore, the agency is well within its scope of discretion to determine, as a matter of statutory standing, the quantum of harm Congress intended before such an action would properly lie. As the Supreme Court has instructed, that determination should not begin from “unlikelihood that Congress meant to allow all factually injured plaintiffs to recover.” *Holmes v SIPC*, 503 U.S. 258, 266 (1992) (cited in *Lexmark*, 134 S. Ct. at 1388). “[S]tatutory causes of action are regularly interpreted to incorporate standard common-law limitations on civil liability—the zone-of-interests test no less than the requirement of proximate causation.” *Lexmark*, 134 S. Ct. at 1389 n.5. See also John Roberts, Article III Limits on Statutory Standing, 42 *Duke L.J.* 1219, 1227 (1993).

The statute permits two different kinds of remedies for violation of section 227(a)(1)(A). The first allows “an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation.”<sup>4</sup> The second involves “an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater.”<sup>5</sup>

The problem with the petition’s interpretation of the statute starts with first principles. Its definition of the statute treats violation of the statute “as the last fact necessary” to make a private cause of action accrue. *Doe v. Chao*, 540 U.S. 614, 620 (2004). As was the case in *Lexmark*, broad language alone does not and should not convey an intent to reach or exceed the bounds of Article III, and the flexibility given by the statute does not require the FCC to approach those limits. *See*

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<sup>4</sup> 47 U.S.C. 227 (b)(3)(A).

<sup>5</sup> *Id.* at (b)(3)(B).

*Lexmark*, 134 S. Ct. at 1388. And, in fact, the language at issue in TCPA cases is far narrower than that contained in the Lanham Act.

Application of that traditional common-law analysis reveals two things. The “zone of interests” protected by the statute protects the privacy of the home from unwarranted and unreasonable intrusions on seclusion. In the business context, the statute protects entities from the cost of unsolicited faxes and other messages crowding out those messages the entity wants or needs. Second, the defendant’s act must proximately cause injury to those interests, which is where the petition fails to prove its point.

**A. The zone of interest protected by the TCPA is limited**

As an initial matter, Congress is “presumed to “legislat[e] against the background of” the zone-of-interests limitation, “which applies unless it is expressly negated.” *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (cited in *Lexmark v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014)). Construction of the statute should therefore begin “with the traditional understanding that tort recovery requires not only wrongful act plus causation reaching to the plaintiff, but proof of some harm for which damages can reasonably be assessed.” *Doe*, 540 U.S. at 621 (citing *W. Keeton et al., Prosser and Keeton on Law of Torts* § 30 (5th ed. 1984)) (emphasis supplied). Absent an express statement by Congress that it intended to stretch the bounds of Article III, the proper way to resolve the zone of interests inquiry is by examining the text of the statute. *Lexmark*, 134 S. Ct. at 1388.

When it enacted the TCPA, Congress made several express statutory findings relevant to interpreting the statute, all of which eschew regulatory flexibility. For example, it found that “Individuals’ privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits

legitimate telemarketing practices.”<sup>6</sup> It also found that “many” consumers were “outraged over the proliferation of intrusive, nuisance calls to their homes,” and that businesses complained that autodialed and prerecorded calls violated their privacy and interfered with interstate commerce.<sup>7</sup> Congress in two different places found that the Commission should have the flexibility to design rules appropriate to the different contexts in which autodialed and prerecorded calls appear: home and business.<sup>8</sup> Importantly, however, it instructed that those restrictions be “reasonable.”<sup>9</sup>

Thus, the zone of interests protected by the Act consist of (a) a privacy interest in the home and business; (b) interference (and arguable intrusion) created by substantial numbers of prerecorded or autodialed phone calls overwhelming a business’s lines and preventing the conduct of its own activity.<sup>10</sup>

**B. The statute requires a causal link between violation of the statute and suffered damage, and regulations should reflect that reality**

There is no indication that Congress intended to dispose of the common-law concept of proximate cause. Unlike the Lanham Act provision construed in *Lexmark*, which provided a cause of action to anyone who “believed” they were harmed, the TCPA is narrower. Triggering the damage provisions in private litigation, it is not merely enough that an autodialed call must be made without consent. SIIA notes that “when the statute gets to the point of guaranteeing the [statutory] minimum, it

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<sup>6</sup> Public Law 102-243, § 2 (7), 105 Stat. 238.

<sup>7</sup> *Id.* §§ 2 (6), (14), 105 Stat. 238-39. “Business privacy” is a bit of an oxymoron, as traditional privacy rights are personal to individuals. *See generally* William L. Prosser, Privacy, 48 Cal. L. Rev. 383 (1960).

<sup>8</sup> *Id.* §§ 2 (13), (15), 105 Stat. 239.

<sup>9</sup> *Id.* § 2(15), 105 Stat. 239.

<sup>10</sup> *See generally, e.g.*, S. Rep. 102-168, at 2 (noting that the receipt of cellular calls caused the consumer to bear the cost of telemarketing, and unsolicited faxes had to be printed on the business’s paper).

not only has confined any eligibility to victims of adverse effects caused by intentional or willful actions, but has provided expressly for liability to such victims for “actual damages.”” *Doe*, 540 U.S. at 619. As the Court noted, it is “hardly unprecedented for Congress to make a guaranteed minimum contingent upon some showing of actual damages, thereby avoiding giveaways to plaintiffs with nothing more than “abstract injuries.”” *Id.* at 626 (quotations in original; internal citation omitted). The damage provision in the TCPA is substantially similarly to the privacy statute at issue in *Doe*, and should be interpreted similarly.

That harm determination should guide the agency’s interpretation of the statute, and such determinations have direct relevance when determining whether an “express” consent has occurred. The statute permits the agency to interpret the statute in a way that permits it to make an independent judgement regarding which kinds of violations are “abstract” and do not cause the required loss. Put another way, the agency has the discretion to define the concept of “express consent” in ways that permit suits to go forward only in the presence of actual harm.

That principle has limits, of course, and those limits are imposed by the language of the statute. The word “express” has several meanings: “to set forth in words, state; to manifest or communicate, as by a gesture; show.”<sup>11</sup> As the petition notes (Pet. at 27-28), both the House and the Senate reached differing conclusions about what “express” means and whether it required a writing.<sup>12</sup> Requiring an intentional gesture (such as providing a phone number to a business) certainly suffices. But given the agency role here, there was no need for Congress

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<sup>11</sup> American Heritage Collegiate Dictionary, 3d ed. 483 (1997). *See also* dictionary.com (“clearly indicated; distinctly stated; definite; explicit; plain”) (visited Mar. 22, 2017).

<sup>12</sup> *Compare* S. Rep. No. 102-178, at 5 (1991) *with* H. Rep. No. 102-317, at 13 (1991).

to resolve that ambiguity—express consent is a question of substance, not of written form.<sup>13</sup>

Our point is that express consent can be manifest by a writing, but it does not require it. Both of those constructions are well within the traditional ordinary meaning of the word, and hence within the bounds of reasonable agency interpretation. The FCC can and should make judgments regarding the point at which “express consent” ends, and loss-causing intrusions on seclusion begin.

### **C. Petitioners’ proposal would create an unfair burden on SIIA members**

SIIA member customers come from every sector of the economy, including education, business, government and consumers, and include a wide range of businesses providing world-class information technology products and services. They develop and market software programs, applications and services, business media, financial data and information products and services, social media services, databases of specialized information, and education technology products and services.

Commercial reality requires that content businesses must reach customers quickly and efficiently with critical information and news, information about software updates, data breaches or unusual account access, or activity that could lead to identity theft or fraud. These services have become more intertwined with and essential to our customers’ work and business lives.

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<sup>13</sup> When Congress requires written consent, it knows how to say so. *See, e.g.*, 21 U.S.C. § 331(y)(2) (prohibiting disclosure of trade secret without “express written consent”); 35 U.S.C. § 122(c) (prohibiting pre-issuance opposition to a patent without “express written consent” of the applicant); 15 U.S.C. § 6701 (d)(2)(B)(xii) (permitting a state to prohibit inclusion of insurance premiums as part of the primary credit transaction without “express written consent”). *Cf.* 17 U.S.C. § 204 (requiring written instrument of conveyance of copyright ownership); 35 U.S.C. § 261 (assignments of patents or interests therein must be in writing).

Fixed phone lines and facsimile machines were the preferred method of contact decades ago, and their abuse created a specific set of privacy harms. These communications channels have evolved—in many but not all cases—to methods that are better able to reach consumers in an efficient and timely manner.

Accordingly, communications aimed at mobile devices, particularly via timely text messages are increasingly a top option for many SIIA members. Recent research has confirmed that text messages are far more effective at reaching consumers for important communications: The average open rate of a text message sits at about 99%, while email ranges from 28-33%. Next to this, the click through rates are vastly different. Include a link in your text message, and you will observe a CTR of about 36%. For email marketing, the CTR usually sits between 6-7%.<sup>14</sup> The intrusion on privacy from a text message is minimal, and cellular providers are increasingly offering plans that reflect consumer habits, with low cost for unlimited sending and receiving of text messages.

The FCC has recently and repeatedly emphasized that, for example, a consumer has consented to communications by virtue of supplying their telephone number to a business.<sup>15</sup> The Petitioners' proposal to require written consent for all calls subject to TCPA regulation is neither required by the language of the statute nor advisable. It ignores both existing commercial practice and context, and this approach would differ from expectations among SIIA's members and their customers. As the Commission has found, requiring "prior express written consent for all robocalls to wireless numbers would serve as a disincentive to the provision of services on which consumers have come to rely."<sup>16</sup> Moreover, consumer who receives a call or text message in that circumstance does not suffer the kind of harm that the statute is intended to prevent.

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<sup>14</sup> Baglia, Matt. "[Text Marketing Vs. Email Marketing: Which One Packs a Bigger Punch?](#)" Business 2 Community. June 30, 2015.

<sup>15</sup> 2015 Order, 30 FCC Rcd 7961, 7991-92 ¶ 52.

<sup>16</sup> 2012 Order, 27 FCC Rcd at 1841 ¶ 29.

Finally, we note that even under existing law, SIIA members face an uncertain and challenging legal environment, and have repeatedly found themselves subject to bet-the-company class-action lawsuits based on harmless errors in business-to-business communications seeking subscription renewals or service continuation. Insuring against TCPA risk is becoming increasingly difficult and expensive even in the existing environment.<sup>17</sup> We strongly urge the Commission not to make that environment worse.

Respectfully submitted,

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<sup>17</sup> See, e.g., Financier Worldwide, Special Report: Insurance Coverage and the Telephone Consumer Protection Act, *available at* [https://www.financierworldwide.com/insurance-coverage-and-the-telephone-consumer-protection-act/#.WNUpwG\\_yupo](https://www.financierworldwide.com/insurance-coverage-and-the-telephone-consumer-protection-act/#.WNUpwG_yupo) (noting that obtaining insurance coverage against TCPA claims is becoming increasingly difficult) (visited Mar. 24, 2017).